

---

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

---

No. 78-1895

---

**THEODORE L. SENDAK, Attorney General**  
State of Indiana, in his official and  
individual capacities,

*Petitioner,*

vs.

**CITIZENS ENERGY COALITION OF INDIANA,**  
d/b/a Citizens Action Coalition of  
Indiana, et al.,

*Respondents.*

---

**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

---

**LOUIS ROSENBERG**  
c/o UAW Legal Services Plan  
442 North Illinois Street  
Indianapolis, Indiana 46204  
Telephone: (317) 638-0068  
Attorney for Respondents

## TABLE OF CONTENTS

	Page
Table of Authorities.....	iii
Opinions Below .....	2
Questions Presented for Review .....	2
Constitutional and Statutory Provisions Involved ...	2
Statement of the Case .....	2
Argument .....	5
Conclusion .....	7
Appendix.....	A-1

## TABLE OF AUTHORITIES

	Page
<i>Cases</i>	
<i>Cheney v. Unroe</i> , 166 Ind. 550, 77 N.E. 1041 (1906) .	6, 7
<i>Citizens Energy Coalition of Indiana, et al. v. Sendak, et al.</i> , 459 F. Supp. 248 (1978) .....	2
<i>Citizens Energy Coalition of Indiana, et al. v. Sendak, et al.</i> , 594 F. 2d 1158 (1979) .....	2, 5
<i>Hale v. Peabody</i> , 343 N.E.2d 316 (1976) .....	6
<i>Presto-lite Co. v. Skeel</i> , 182 Ind. 593, 106 N.E. 365 (1914) .....	6
<i>Secretary of State of Indiana v. Indiana AFL-CIO, et al.</i> , 317 N.E.2d 1343 (1978).....	6
<i>Statutory Provisions</i>	
28 U.S.C. §1331 .....	5
28 U.S.C. §1337 .....	5
28 U.S.C. §1343(3) .....	5
42 U.S.C. §6805 .....	5, 6
Ind. Code 2-4-3-7 .....	5, 6, and 7

IN THE  
**Supreme Court of the United States**

---

OCTOBER TERM, 1978

---

No. 78-1895

---

THEODORE L. SENDAK, Attorney General  
State of Indiana, in his official and  
individual capacities,

*Petitioner,*

vs.

CITIZENS ENERGY COALITION OF INDIANA,  
d/b/a Citizens Action Coalition of  
Indiana, et al.,

*Respondents.*

---

**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

---

Respondents respectfully pray that this Court deny Theodore L. Sendak's Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit affirming the decision of the United States District Court for the Southern District of Indiana, Indianapolis Division.

### OPINIONS BELOW

Notwithstanding Petitioner's assertions to the contrary, both the District Court's and the Seventh Circuit's opinions have been officially reported. The District Court's opinion is entitled *Citizens Energy Coalition of Indiana, et al. v. Sendak, et al.* and can be found at 459 F. Supp. 248 (1978). Bearing the same caption, the Seventh Circuit's opinion is at 594 F. 2d 1158 (1979).

### QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit erred in holding that the District Court had jurisdiction over this cause?
2. Whether the Seventh Circuit erred in holding that Ind. Code 2-4-3-7 does not provide legal authority for the State Attorney General's policy of disapproving subgrants allocated by the Indiana Public Counselor pursuant to 42 U.S.C. §6805 to consumer groups who retain lobbyists.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §6805, 28 U.S.C. §1331, 28 U.S.C. §1337, U.S.C. §1343(3), Ind. Code 2-4-3-7 and Ind. Code 4-13-2-14.

### STATEMENT OF THE CASE

This Petition arises from the Seventh Circuit's affirmance of a preliminary injunction entered by the District Court. As it pertains to the Petitioner, that injunction reads as follows:

IT IS HEREBY ORDERED that defendant Theodore L. Sendak, acting in his official and individual capacities,

should be and is hereby enjoined from refusing to approve subgrants for financial assistance allocated by the Public Counselor in accordance with the consumer group program pursuant to 42 U.S.C. §6805, solely on the basis that the subgrantees retain lobbyists.

The underlying facts are recited in detail in the District Court's opinion. Respondents will merely summarize those findings especially relevant to the instant Petition.

Respondents are two, not-for-profit Indiana corporations and their chief executives. Citizens Energy Coalition of Indiana (CAC) operates on a statewide basis and has numerous organizational and individual members. Indiana Public Interest Research Group (InPIRG) draws most of its 3,000 members from the Bloomington campus of Indiana University. For several years, CAC and InPIRG have conducted research on utility issues and advocated consumer interests before the Public Service Commission of Indiana (PSCI) and the Indiana General Assembly.

In September, 1977, the United States Department of Energy (DOE), pursuant to 42 U.S.C. §6805, approved a grant to the Indiana Public Counselor to augment his presentations before the PSCI and to assist Indiana consumer groups in their appearances before the PSCI. On December 21, 1977, the Public Counselor and CAC signed a contract whereunder, among other things, CAC was to prepare guidelines for considering subgrant applications by consumer groups. By January 24, 1978, CAC completed its work under the December 21, 1977 contract.

Shortly thereafter, CAC officially designated its chief executive, Fritz Wiecking, as a lobbyist before the Spring session of the 1978 Indiana General Assembly. Two weeks earlier, InPIRG had similarly designated its Director, Tom Wathen.

On March 29, 1978, the Indiana Attorney General disapproved the Public Counselor's December 21, 1977



contract with CAC. Noting CAC's designation of Wiecking as a lobbyist, the Attorney General stated that this role created a conflict of interest and might violate I.C. 2-4-3, et seq.

Subsequent communications between the Attorney General's Office and the Public Counselor established that the Attorney General's disqualification of lobbying consumer groups would be applied to subgrant applications as well as contracts. As a result, when CAC and InPIRG subsequently applied for financial assistance to participate in three major rate proceedings, their applications were denied on the grounds that they had lobbied.

In June, 1978 DOE directed the Public Counselor to refrain from spending any other DOE moneys earmarked for consumer assistance until the lobbyist issue could be resolved. Soon afterwards, Respondents commenced their action in the District Court.

## ARGUMENT

### **I. In holding that the District Court had jurisdiction, the Court of Appeals' decision did not conflict with any decision of this Court or of another Court of Appeals.**

Petitioner requests in part that this Court grant certiorari in order to correct an alleged error by the Court of Appeals in applying 28 U.S.C. §1331. While Respondents believe that the District Court did have federal question jurisdiction under 28 U.S.C. §1331, it is enough to point out that the Appeals Court did not even consider whether the District Court had jurisdiction under this statute. Instead, the Court of Appeals expressly held that the lower court had commerce jurisdiction under 28 U.S.C. §1337 and implicitly found civil rights jurisdiction under 28 U.S.C. §1343(3), 594 F.2d 1158, 1161,62. Petitioner did not contest the Court of Appeals' holdings regarding 28 U.S.C. §1337 and 28 U.S.C. §1343(3).

Petitioner is, therefore, asking this Court to consider an issue which is academic for two reasons. First, the issue is academic, because the Court of Appeals did not even discuss it. Secondly, even if this Court determined that the District Court did not have jurisdiction under 28 U.S.C. §1331, this Court would still have to affirm the Seventh Circuit's decision, because of Petitioner's failure to contest jurisdiction under 28 U.S.C. §1337 and 28 U.S.C. §1343(3).

### **II. The Seventh Circuit did not err in holding that Ind. Code 2-4-3-7 does not provide legal authority for Petitioner's policy of disapproving subgrants under 42 U.S.C. §6805 to lobbying consumer groups.**

Ind. Code 2-4-3-7 provides in pertinent part as follows:

It shall be unlawful for any public official of this state, or of any county, township, city or town, including elective and appointive officers and employees or any officer, member or employee of any state central committee of any party, to receive any compensation whatsoever from any source, directly or indirectly, for appearing before the General Assembly of the State of Indiana, before either house or any committees of the General Assembly or either house thereof or before any member as a legislative counsel or agent.

The Court of Appeals held that the above statute provided no legal authority for disapproving subgrants under 42 U.S.C. §6805 to consumer groups, solely because the consumer groups lobby or retain lobbyists.

A predicate to the Seventh Circuit's holding is that the term "public officials and employees" does not include persons or organizations who merely receive subgrants from the state. Petitioner fails to cite any legal authority or any dictionary, legal or otherwise, defining these words to include subgrantees. The legal question raised by the Petitioner has not been directly commented on by any court known to Respondents, perhaps because no one has heretofore doubted the answer.

In any event, it is well settled in Indiana law that neither contractees, must less subgrantees, are employees. *Presto-lite Co. v. Skeel*, 182 Ind. 593, 106 N.E. 365, (1914) and *Hale v. Peabody*, 343 N.E.2d 316 (1978).

The cases cited by Petitioner as supporting his position that the terms "public officials and employees" include subgrantees are irrelevant. *Secretary of State of Indiana v. Indiana AFL-CIO, et al.*, 371 N.E.2d 1343 (1978) held that a person sitting on a state advisory board was a public official, even if that person was not compensated for his public duties. *Cheney v. Unroe*, 166 Ind. 550, 77 N.E. 1041 (1906), did not construe Ind. Code 2-4-3-7. Instead, *Cheney*

applied another state statute which barred certain public officials from having a financial interest in the contracts they let. In *Cheney*, a county superintendent of roads let a contract and then was employed by the contractor to do some of the road work. This case has nothing to do with defining the term "public employees and public officials".

In sum, the Court of Appeals' application of Ind. Code 2-4-3-7 is supported by that provision's plain language and does not conflict with any Indiana legal authority.

### CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to review the judgment and order of the Seventh Circuit should be denied.

Respectfully submitted,

Louis Rosenberg  
c/o UAW Legal Services Plan  
442 North Illinois Street  
Indianapolis, Indiana 46204  
Telephone: (317) 638-0068  
Attorney for Respondents

# **APPENDIX**



# **APPENDIX**

## **FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## **FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## 42 U.S.C. §6805

**§6805. Grants for State consumer protection offices by Secretary****Establishment, operation, and purpose; qualifications for funds**

(a) The Secretary may make grants to States, or otherwise as provided in subsection (c) of this section, under this section to provide for the establishment and operation of offices of consumer services to assist consumers in their presentations before utility regulatory commissions. Any assistance provided under this section shall be provided only for an office of consumer services which is operated independently of any such utility regulatory commission and which is empowered to—

(1) make general factual assessments of the impact of proposed rate changes and other proposed regulatory actions upon all affected consumers;

(2) assist consumers in the presentation of their position before utility regulatory commission; and

(3) advocate, on its own behalf, a position which it determines represents the position most advantageous to consumers, taking into account developments in rate design reform.

**Grants subject to State assurances on funds**

(b) Grants pursuant to subsection (a) of this section shall be made only to States which furnish such assurances as the Secretary may require that funds made available under such section will be in addition to, and not in substitution for, funds made available to offices of consumer services from other sources.

**Offices established by Tennessee Valley Authority**

(c) Assistance may be provided under this section to an office of consumer services established by the Tennessee Valley Authority, if such office is operated independently of the Tennessee Valley Authority.

As amended Pub.L. 95—617, Title I, §143, Nov. 9, 1978, 92 Stat. 3134.

## 28 U.S.C. §1331

**§1331. Federal question: amount in controversy; costs**

(a) The district courts have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

As amended July 25, 1958, Pub.L. 85-554, §1, 72 Stat. 415; Oct. 21, 1976, Pub.L. 94-574, §2, 90 Stat. 2721.

## 28 U.S.C. §1337

**§1337. Commerce and anti-trust regulations**

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of

Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

June 25, 1948, c. 646, 62 Stat. 931.

## 28 U.S.C. §1343

### §1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, §42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85—315, Part III, §121, 71 Stat. 637.

## Ind. Code 2-4-3-7

**2-4-3-7 [34-306]. Lobbying for pay by public officials or members of the press prohibited—Sale of bills by officers and employees of general assembly prohibited.**—It shall be unlawful for any public official of this state, or of any county, township, city or town, including elective and appointive officers and employees, or any officer, member or employee of any state central committee of any party, to receive any compensation to appear before the general assembly of the state of Indiana, or before either house or any committees of the general assembly or either house thereof or before any member as a legislative counsel or agent on behalf of any person, firm, corporation or association from which he directly or indirectly receives any compensation or salary, other than the state of Indiana, or the county, township, city, town or state central committee with which he is associated.

It shall be unlawful for any elective or appointive officer or employee of either house of the general assembly, or any representative of any newspaper or press association, or other person having the privilege of the floor of either house, to act as a legislative counsel or agent, and it shall be further unlawful for any such person to promote or oppose any legislation by personal solicitation, appeal or threat to any member. It shall be unlawful for any proprietor, editor or publisher of any newspaper, journal, periodical or other publication, printed or circulated in this state, to receive any compensation whatsoever or thing of value in the nature of an award from any source, either directly or indirectly, for the printing of any article, editorial, news item (so-called), or advertisement, either for or against any bill or resolution pending before either house of the general assembly of this state, without indicating in such article, editorial, news item (so-called) or advertisement, at whose

instance the same was so printed, and the compensation or thing of value received therefor.

The officers and employees of the general assembly, or of either house thereof, are prohibited from supplying, for a compensation, given directly or indirectly, any bill, memorial or resolution to any person, firm, company, corporation or association, except upon a written order of the presiding officer of one of the two[2] houses. [Acts 1915, ch. 2, §7, p. 5; 1977, P.L. 4, §1, p. 105.]

**Ind. Code 2-4-3-9**

**2-4-3-9 [34-308]. Penalty.**—Whoever violates any of the provisions of this act [2-4-3-1—2-4-3-9] shall be guilty of a felony, and, upon conviction thereof, shall be fined not less than two hundred dollars [\$200] nor more than one thousand dollars [\$1,000], or imprisoned not less than three [3] months nor more than one [1 year]. It shall be the duty of the attorney-general, upon information, to bring prosecutions under this section. [Acts 1915, ch. 2, §8, p. 5.]

**Ind. Code 4-13-2-14**

**4-13-2-14 [60-1814]. Contracts and leases—Approval by attorney-general—Filing.**—All contracts and leases shall be approved as to form and legality by the attorney-general. A copy of every such contract or lease extending for a term longer than one [1] year shall be filed with the director of public works and supply [department of administration]. [Acts 1947, ch. 279, §14, p. 1138.]